(8)

No. 98-1299

In The

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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20 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Legislative History

Miscellaneous

ARGUMENT

The issue presented by this case is whether a defendant can expressly agree to conduct his trial beyond the Interstate Agreement on Detainers' (IAD) statutory period and then turn around and disclaim his prior agreement and obtain dismissal of the case because the trial was untimely, thus "sandbagging" the court and prosecution. Regardless of respondent's actual intent here the effect of his express agreement to the trial date was the same as if he had consciously sought to trap or sandbag the prosecution and the court in that it led them to believe that all was well and thus lulled them into a posture of inaction, only to have respondent then turn around and seek dismissal by disavowing his earlier agreement at a time when the problem could no longer be corrected. The holding of the New York Court of Appeals now allows for this, but a defendant's attempt to use the IAD as both a sword and a shield in this manner should not be countenanced.

A. Respondent's discussions of the tolling provisions of the Interstate Agreement on Detainers and the duty of compliance thereunder are irrelevant.

Much of respondent's opposing brief is addressed to the IAD's tolling provisions allowing for "necessary and reasonable continuances" upon a showing of good cause in open court (Arts. III[a], IV[c]) and for exclusion of time "whenever a defendant is unable to stand trial" (Art. VI[a]). Respondent contends that his agreement to an untimely trial date did not fit within these tolling provisions; however, at least from the outset of appellate proceedings in this matter petitioner has never contended otherwise. Rather, we have simply urged that, as the trial court

found in denying respondent's dismissal motion, respondent's express agreement waived his IAD rights. Similarly, while respondent claims that courts and prosecutors have the responsibility to ensure that the IAD's provisions are complied with we take no issue with such duty of compliance, but such also has no bearing on the waiver issue.[1] In the same vein, respondent's discussion of the doctrines of "preservation" and "contemporaneous objection" are likewise irrelevant since we have never contended that respondent failed to preserve his IAD claim for appellate review and as we have repeatedly emphasized this case does not involve waiver by silence or failure to object but instead waiver by express, affirmative conduct. Respondent thus goes to great lengths to establish propositions that are not at issue in this case, and while the statute in question may indeed impose certain duties on the court and the prosecution and contain provisions for tolling the period within which a defendant has a right to be tried "such conclusion[s] [say] nothing about whether a defendant may relinquish that right by voluntary agreement" (*Mezzanatto*, 513 U.S. at 200, n.2). Thus, whether under the IAD the defendant's consent to a particular procedure allows for exclusion of a certain time period for purposes of calculating when

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1 Indeed, as would be expected by the very nature of our system of criminal jurisprudence few criminal statutory procedures place the "burden", if any, on the defendant, yet this hardly means that the defendant cannot waive such procedural protections; as this Court has made plain, there is a general presumption that rights are waivable (*e.g., United States v Mezzanatto*, 513 U.S. 196, 200-201 [1995]; *see also, Peretz v United States*, 501 US 923, 936-937 [1991]).

the defendant's trial is to be held has no bearing on the issue presented here of whether the defendant can then simply (and directly) relinquish that right to trial within the established period.

B. Respondent, despite also arguing to the contrary, concedes that IAD rights may be waived.

Respondent's brief in opposition is actually an extended exercise in self-contradiction, as at various times he concedes that IAD rights may be waived - while further claiming that the circumstances here do not constitute waiver - yet at other times he contends that IAD rights cannot be waived. Respondent of course cannot have it both ways, and he indeed has it right when he asserts that "action by the defense that is contrary to the provisions of the IAD" constitutes waiver (Br. For Resp. 28; *see also, id.* at 9 ["waiver should only be found where the actions of the defendant clearly require a finding that the defendant relinquished his right to assert violations of the IAD"]). While respondent also urges that he "did not act . . . in a manner contrary to the provisions of the IAD" (*id.*, at 28-29), with all due respect, if expressly agreeing to trial beyond the statutory period is not acting contrary to the IAD then nothing is.

Respondent's claim that "many courts" have imprecisely substituted waiver analysis for the statutory good cause tolling standard (*id.*, at 29-30) is incorrect. He cites only three cases in this regard, none of which support his argument. Indeed, in *United States v Odom* (674 F.2d 228 [4th Cir 1982], *cert. denied* 457 U.S. 1125 [1982]) the court, in addition to discussing waiver, expressly addressed the good cause tolling provision and made clear that its waiver analysis was separate and distinct therefrom, while in *Drescher v. Superior Court* (218 Cal. App.3d 1140, 267

Cal. Rptr. 661 [Cal. Ct. App. 1990]) the court also clearly distinguished between continuances prior and up to the court proceeding at which the trial date was set and the trial setting proceeding itself (*id.*, at 1148, 267 Cal. Rptr. at 666). The authority previously cited by petitioner in our main brief dispels any notion that the courts therein were mistakenly commingling the discrete concepts of good cause continuances and waiver – waiver was instead recognized as a very distinct concept in those decisions.

Respondent further asserts that waiver analysis "should never override but, instead, must complement the IAD's time requirement" (Br. for Resp. 30); however, waiver by its very nature constitutes an "overriding" of statutory provisions since it represents the surrender of one's right to rely thereon. It is difficult to understand how waiver could "complement" statutory tolling provisions and still be considered "waiver" as that concept is generally understood, especially since respondent concedes that waiver arises by a defendant's action that is contrary to the provisions of the IAD. What respondent is really suggesting in this regard is that waiver must essentially meet the statutory test for tolling, which of course would make the idea of waiver redundant and in effect a nullity. This in turn is really no different than saying that waiver is subsumed within the tolling provisions and is not otherwise independently applicable or available, a claim which, despite his concessions to the contrary, defendant also makes more directly but which is groundless.

C. IAD rights are waivable.

Despite his express acknowledgment throughout these proceedings, including in his brief to this Court, that IAD rights are waivable in general and can be waived specifically by action

of the defense contrary to the IAD, respondent now for the first time also claims that IAD rights are not waivable (*e.g.*, Br. for Resp. 31-39). However, we submit that respondent has in fact waived his nonwaivability argument by failing to raise it in his brief in opposition to the petition for certiorari (*e.g.*, *Knowles v. Iowa*, 525 U.S. 113, __, n.2 [1998]; *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 [1985]; Court Rule 15.2).

In any event, respondent's claim is erroneous as he wholly fails to overcome the presumption of waivability (*e.g.*, *Mezzanatto*, 513 U.S. at 200-201). Initially, his apparent reliance on *United States v. Mauro* (436 U.S. 340 [1978], *affg. United States v. Ford*, 550 F.2d 732 [2nd Cir. 1977]) is misplaced. Clearly *Mauro* does not suggest that IAD rights are not waivable; to the contrary, there this Court undertook an analysis of whether the defendant had waived the IAD and concluded that he had not since from the time he was arrested he persistently requested that he be given a speedy trial (at one point specifically mentioning that the detainer was causing him denial of certain privileges in prison) and thus his actions were sufficient to put the government and the trial court on notice of the substance of his claim (*Mauro*, 436 U.S. at 364). "This factual analysis would have been pointless if the Court were of the opinion that IAD rights could not be waived" (*Kowalak v. United States*, 645 F.2d 534, 537, n. 1 [6th Cir. 1981]). Here, as we have previously noted (Br. for Pet. 21), respondent never made any mention of even general speedy trial concerns, let alone IAD concerns, until he brought his motion for dismissal under the IAD after the statutory period had expired. Furthermore, since constitutional speedy trial rights are waivable (*see*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 [1973]; *Barker v. Wingo*, 407 U.S. 514 [1972]) certainly statutory speedy trial rights are presumably waivable as well (*see generally*, *Annotation*, *Waiver or Loss of Accused's Right to Speedy Trial*, 57 A.L.R.2d

302, §§3, 9 [1958] [indicating that speedy trial waiver is available in vast majority of jurisdictions]).

The IAD of course does not by its own terms preclude waiver (*see*, *Mezzanatto*, 513 U.S. at 201-202 [express waiver clause may preclude waiver under any other circumstances]), and respondent's discussion of "Congressional intent" regarding the IAD to support his view of nonwaivability is inaccurate and unpersuasive. In the first place, while respondent repeatedly refers to Congress's "drafting" of the IAD, Congress did not draft such. The IAD was drafted primarily by various state and local representatives and agencies more than a decade before Congress "signed on" and joined the United States and the District of Columbia as parties to the Agreement in 1970 (*e.g.*, *Mauro*, 436 U.S. at 343, 349-351). (By that time more than half of the States now party to the agreement had already joined [S. Rep. No. 91-1356 (1970) *reprinted in* 1970 U.S.C.C.A.N. 4864, 4866].) Thus, as for any intent of Congress there was relatively little, if any, at least in the sense of "independent" intent; "Congress enacted the Agreement into law . . . with relatively little discussion and no apparent opposition" (*Mauro*, 436 U.S. at 353 [emphasis added]).[2] Moreover, there is no discussion whatsoever in either the federal or the state/local legislative history regarding the general waivability of the provisions, let alone an affirmative indication that waiver (either of the overall provisions in general or the

2 Thus respondent's claim that Congress made a conscious "decision" to not include a reference to "consent" in the good cause tolling provision of the IAD as it did in drafting other legislation is spurious - Congress did not create the IAD but merely joined in a statute already created; there was no reason for Congress to alter the IAD even if it could, as the whole idea behind uniform legislation is uniformity.

speedy trial provisions in particular) was deemed undesirable and unavailable.

While respondent urges a comparison between the Federal Speedy Trial Act (FSTA as designated by respondent) and the IAD to support his claim of nonwaivability, such comparison actually defeats his position. Thus, while respondent refers to the fact that the IAD and the FSTA both contain specific tolling provisions that alone does not preclude waiver.[3] Both the statutory text and the legislative history of the FSTA, which was crafted by Congress some years after Congress "joined" the IAD, clearly reflect a desire to strictly limit the availability of waiver, in stark contrast to the IAD. Thus, the FSTA, unlike the IAD (and contrary to respondent's assertion [Br. for Resp. 35]), expressly provides that "[f]ailure of a defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal [of the case]" (18 U.S.C. §3162[a][2] [emphasis added]), and as noted an express waiver clause may suggest that Congress intended to preclude waiver

3 Respondent also refers to the IAD's "strict time requirements", but such is a necessary component of any statutory speedy trial provision lest such provision be superfluous.

under other unstated circumstances (*Mezzanatto*, 513 U.S. at 201).[4] Furthermore, while a significant "public (societal) interest" in statutory provisions may preclude waiver by a private party, once again the FSTA, unlike the IAD, expressly establishes such interest. Thus, section 3161(h)(8)(A) – the provision most analogous to the good cause tolling provision of the IAD – provides that delay caused by a continuance will be excluded from the speedy trial period only if

> the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or

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4 Dismissal of the case is the only sanction or remedy available under the IAD and the primary sanction/remedy under the FSTA; as this Court stated in *Barker v. Wingo* (407 U.S., *supra*):

> The amorphous quality of the [speedy trial] right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exlusionary rule or a reversal for a new trial, but it is the only possible remedy (*id.*, at 522 [footnote omitted]).

> in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial (emphasis added).

Thus Congress expressly recognized and emphasized the public's interest in a speedy trial under the FSTA, and this statutorily affirmed interest is further buttressed by express legislative history which makes disapproval of waiver unmistakably clear:

> The [Senate] Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal . . . is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.
>
> (S. Rep. No. 212, 96th Cong., 1st Sess. 28-29 [1979]).

The total lack of any similar language in the IAD or any similar expression of intent in the legislative history thereof is striking, and respondent's attempt to transplant the text and legislative history from the FSTA to the IAD is inappropriate, especially in

light of the principle that statutory rights are presumptively waivable .[5] Thus, waiver, while not generally available under the FSTA, is available under the IAD and many of the very same courts recognize this distinction – certainly no Federal Courts of Appeals have found the IAD unwaivable (*see*, Br. for Pet. 6-7; Br. for Amicus 8-9, n.5, 12-13, n.7).

While there may be a societal interest in the IAD, as previously explained by petitioner (Br. for Pet. 7) and the United States (U.S. Amicus Br. 10-12) such is subsidiary to that of the prisoner, who is the primary beneficiary of the IAD. As respondent expressly conceded below, "[t]he rights created by the IAD are for the benefit of the prisoner, exist for his protection and are personal to him."(Br. for App. [N.Y.Ct. Apls.] 11). "The legislative history of the Agreement . . . emphasizes that a primary purpose of [it] is to protect prisoners against whom detainers are outstanding" (*Cuyler v. Adams*, 449 U.S. 433, 449 [1981] [emphasis added]). Furthermore, while the IAD "enable[s] the prison authorities to plan more effectively for [the prisoner's] rehabilitation and return to society" (S. Rep. No. 91-1356 (1970) *reprinted in* 1970 U.S.C.C.A.N. 4865) it reserves to the prisoner and the state lodging the detainer – which is not likely concerned with possibly disrupting the prisoner's rehabilitation – the decision to pursue disposition of the detainer charges; the prison authorities may not compel disposition by instigating the prisoner's transfer. In fact, the state lodging the detainer is not compelled under the IAD to even pursue a transfer and even when it does the sending

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5 Indeed, one can reasonably contend that Congress itself recognized the waivability of the IAD in light of the intent it expressed and the precise statutory language it utilized in drafting the FSTA in light of the IAD, which was already "on the books" without any similar intent or language.

state ("the governor") can disapprove such (Art. IV[a]); thus it is only the prisoner who has absolute control over the transfer.

Indeed, many of the public concerns addressed by a general speedy trial requirement are implicated to a much lesser degree or altogether extinguished in an IAD case in comparison to a "normal" (i.e., non-IAD) case. This Court identified certain societal speedy trial interests in *Barker v. Wingo* (*supra*), explaining that the inability of courts to provide a prompt trial contributes to a backlog of cases which, e.g., enables defendants to negotiate more effectively for pleas to lesser offenses and otherwise manipulate the system; that defendants released on bail for lengthy periods awaiting trial have an opportunity to commit other crimes and may be tempted to jump bail and escape; that if defendants cannot make bail they are generally held in local jails with overcrowding and deplorable conditions which have a detrimental effect on rehabilitation; and that lengthy pretrial incarceration is costly in terms of actual detention as well as lost wages which defendants might have earned and support to families of incarcerated defendants (*id.*, at 520-521). However, in the case of an inmate transferred from one facility to another under the IAD most of these concerns are either minimal or altogether nonexistent. Thus, the IAD defendant, unlike the "typical" defendant, is already in custody and must remain in custody throughout the proceedings; bail is not available and the defendant does not have the opportunity to jump bail and/or commit other crimes, nor is the "cost" of detention a consideration (other than which jurisdiction bears such) since such is mandatory and unavoidable. In addition, the number of IAD defendants in the typical local (i.e., receiving state) facility at any given time is minuscule compared to the regular inmate population, and the very nature of the IAD process - with its additional procedures and corresponding paperwork, etc. - tends to ensure that as a practical

matter only more serious or significant cases which will garner a measure of extra attention are involved, meaning that such cases are less likely than "regular" cases to fall through the cracks and/or allow for manipulation of the system by defendants and undesirably lenient plea bargains. The primary purpose of the IAD is to benefit the prisoner, who thus should be free to waive his IAD protections if he determines that such would best accommodate his interests - this Court should "hesitate to elevate more diffused public interests above [respondent's] considered decision that he would benefit personally from [waiver]" (*Town of Newton v. Rumery*, 480 U.S. 386, 395 [1987]).[6]

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6 It must also be noted that even under the generally nonwaivable FSTA a number of courts have recognized a common-sense exception for delays caused or furthered by a defendant's conduct (*e.g., United States v. Gambino*, 59 F.3d 353, 360-361 [2nd Cir. 1995], *cert. denied* 517 U.S. 1187 [1996]; *United States v. Kucik*, 909 F.2d 206, 210-211 [7th Cir. 1990], *cert. denied* 498 U.S. 1070 [1991]; *United States v. Pringle*, 751 F.2d 419, 434 [1st Cir. 1984]). The *Pringle* court explained that a defendant should not be allowed to "[work] both sides of the street" and be rewarded with an enhanced chance for dismissal by "lulling the court and prosecution into a false sense of security"; to the extent the Act protects the public's interests in a speedy trial it places limits on the actions of the defense, and where it is the conduct of the defense which creates the delay it is only the public's interest which is violated, thus dismissal as a sanction is inappropriate since it would serve as a powerful incentive for defendants to create delay (751 F.2d at 434; *see also, Kucik*, 909 F.2d at 211 [regardless of whether defendant intentionally set trap for government and court, where he actively participated in continuance he could not then "sandbag" government and court by counting that time in speedy trial motion]).

D. While the holding of the New York Court of Appeals was certainly "within its province" it was also wrong and if allowed to stand will not only permit sandbagging but will also promote diversity and inconsistency in IAD practice instead of the necessary uniformity.

Respondent lastly appears to contend that the holding of the New York Court of Appeals should be allowed to stand because each party to the IAD should be free to employ its own waiver analysis even though such may result in irreconcilably conflicting determinations under identical factual scenarios. Yet in practically the same breath respondent recognizes and indeed emphasizes the need for "uniform interpretation" of the IAD and a "uniform federal standard" regarding waiver (Br. for Resp. 39).[7] The whole reason this case is before the Court is to decide how a defendant's express agreement to an untimely trial date impacts the IAD since heretofore the IAD parties have not resolved this issue consistently. It hardly promotes the uniformity of a supposedly uniform law – the very existence of which is based on mutual agreement – or fosters respect for our system of justice to tolerate a situation where, e.g., defendants identically situated might be convicted of murder and sentenced to death or instead have their murder cases forever dismissed simply because the respective jurisdictions applied the very same law differently.

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7 Consideration of what circumstances do not give rise to waiver (*see*, Br. for Resp. 39-40) necessarily entails consideration of circumstances that do.

It must be remembered that the IAD does not disappear from the case once the prisoner is transferred to the receiving state but instead continues to apply until the prisoner is returned - the transfer is only temporary and the prisoner is deemed to remain in the custody of and subject to the jurisdiction of the sending state (*e.g.*, Arts. III[e], IV[a], V[a], [e], [f], [g]). Thus while a prisoner is, e.g., standing trial in the receiving state at which the state rules and procedures attendant a "regular" state prosecution apply, the IAD also continues to operate. If each IAD party were free to apply its own rules to the IAD the whole objective of consistency and certainty would be defeated. Indeed, this Court would have had no occasion to consider, e.g., at what point the Article III 180-day period "commences" (*Fex v. Michigan*, 507 U.S. 43 [1992]) or whether the IAD applies to probation violation charges (*Carchman v. Nash*, 473 U.S. 716 [1985]) if it were deemed preferable to leave such to the individual parties even though the result was irreconcilable conflict. Moreover, it makes no sense to say that interpretation/application of the IAD's actual statutory provisions should be subject to a national, uniform standard yet whether those provisions can be/are waived or do not apply should not be subject to such a standard and should instead be left to some fifty different evaluations. These notions are merely two sides of the same coin and thus should be treated in the same manner (*see*, *Cuyler*, 449 U.S. at 438 ["construction" of IAD presents federal question], 442 ["interpretation" of IAD presents federal question]).

Furthermore, respondent's suggestion that the New York Court of Appeals was merely applying a "state" waiver analysis to the issue here is wrong; it is clear from that court's decision that it was instead relying on "national", including federal, authority addressing the IAD (Pet. for Cert. A-6-A-8). There was no violation of the state speedy trial statute here (a "ready trial" rule)

(N.Y. Crim. Proc. Law §30.30 [McKinney 1992]) as the People announced readiness for trial repeatedly from the time of respondent's initial court appearance in New York following his transfer (App. 50, 51, 36), which was all that was required. Respondent never claimed any state speedy trial violation and the New York Court of Appeals made no reference whatsoever to this state statute in addressing the IAD issue. In any event, contrary to respondent's contention, under the state statute a defendant's express agreement to a continuance is normally deemed a waiver sufficient to relieve the People of responsibility for the delay (*see*, *e.g.*, *People v Smith*, 82 N.Y.2d 676, 601 N.Y.S.2d 466, 619 N.E.2d 403 [N.Y. 1993]; *People v Liotta*, 79 N.Y.2d 841, 580 N.Y.S.2d 184, 588 N.E.2d 82 [N.Y. 1992]; *People v Meierdiercks*, 68 N.Y.2d 613, 505 N.Y.S.2d 51, 496 N.E.2d 210 [N.Y. 1986]).

Finally, while IAD parties may "need enough flexibility to adequately determine cases where factual ambiguities ...arise" (Br. for Resp. 43) a holding for petitioner here would not undermine such concern.[8] There is no dispute whatsoever here as to precisely what occurred and the only issue is the legal effect that attaches to the conceded circumstances. A ruling that a defendant's express agreement to an untimely trial under the IAD precludes him from thereafter obtaining dismissal of the case would provide very clear guidance to the IAD parties as well as to the actual "players" in the underlying proceedings.

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8 Respondent stubbornly continues to suggest that there was "ambiguity" in his purported waiver (Br. for Resp. 41, 43), but there is simply no uncertainty about a defendant's actions or intentions when he tells a court that a proposed trial date "will be fine."

We thus continue to urge that the order/judgment of the New York Court of Appeals be reversed and respondent's murder and robbery convictions reinstated.

Respectfully submitted,

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